IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MAE B. BURGESS, Co-Administratrix, FRED FANCHER and ADRIAN J. GUM, Co-Administrators, of the Estate of T. A. BURGESS, Deceased,
Petitioners,

vs.

RELIANCE LIFE INSURANCE COMPANY, a Corporation,
Respondent.

No. 462

PETITION FOR CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
All of Columbia, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

Textbook Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MAE B. BURGESS, Co-Administratrix, FRED FANCHER and ADRIAN J. GUM, Co-Administrators, of the Estate of T. A. BURGESS, Deceased,
Petitioners,

vs.

RELIANCE LIFE INSURANCE COMPANY, a Corporation,
Respondent.

No. .....

PETITION FOR CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your petitioners, Mae B. Burgess, coadministratrix; Fred Fancher and Adrian J. Gum, coadministrators of the estate of T. A. Burgess, deceased, file and submit this as their petition for writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit.

The Circuit Court of Appeals on May 29, 1940, reversed a decision and judgment of the District Court of the United States for the Western District of Missouri in favor of the petitioners herein and against the respondent, directing entry of judgment in favor of the respondent without further trial by a jury (Opinions, R. 344-355).

On June 12, 1940, your petitioners filed the following motions: (1) motion for rehearing (R. 391-413); (2) motion to modify opinion and remand cause for jury trial upon issue of insanity and upon issue of suicide, with affidavit of Dr. G. W. Robinson, psychiatrist, concerning his opinion of insanity to be offered on retrial; (3) motion to modify opinion and judgment by correcting certain statements and adding additional facts, material to the issues decided (R. 385-391); (4) motion to dismiss cause for lack of jurisdiction (R. 361-368). These motions were denied August 5, 1940 (R. 421-422). The mandate had been stayed by proper order (R. 424) and the cause is now filed and docketed herein for decision.

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause was initiated by the respondent insurer as plaintiff in a declaratory judgment action filed in the United States District Court for the Western District of Missouri. The petition sought a declaratory judgment that T. A. Burgess, who was insured by the respondent for $11,000.00 against accidental death, did not die as a result of an accident. It was charged that the insured Burgess died as a result of suicide while sane. (Under the law of Missouri death is considered as accidental if it were unintentionally caused or if it results from suicide while insane.)

The answer denied the existence of an actual justiciable controversy and denied the allegation of the petition that the insured's death resulted from suicide while sane.

The cause was tried in the District Court and submitted to a jury upon special interrogatories touching the issues of sanity and suicide. The jury, after deliberating, advised the District Court in writing twice that it was equally divided on the question of whether the death was a suicide (R. 240-241). They further advised the Court (R. 241) that

the jury was unanimously agreed "that, whether accident or suicide, Mr. Burgess was not, at the time of the accident or suicide, in his normal mental condition." The District Court then gave a special charge upon what constituted insanity within the meaning of the law and submitted a special interrogatory touching that issue only (R. 242-243). The jury immediately found that the insured was insane, but returned no general verdict and made no general finding upon the question of accident or suicide (R. 244). The Court then instructed the jury that, having found insanity, the question of intentional self-infliction of the wound causing death was immaterial (R. 245). Thereupon the jury returned a general verdict for the petitioners (R. 246). The interrogatories with reference to suicide were never answered because of the jury's disagreement on that issue.

The only evidence offered by the respondent insurer in its case in chief were the policies of insurance involved and a coroner's certificate of death stating its cause to be "self-*inflicted* gunshot wound" and "suicide." (The certificate of death seems clearly incompetent under the Missouri law. This is the sole evidence offered to make a prima facie case for the respondent. The Court of Appeals refused to pass on its competency, at the same time holding that a prima facie case had been made. Question was raised at the trial by objection [R. 21-31], by motion for directed verdict [R. 34-35], in petitioner's brief on appeal [Point II, p. 58], and in the motion for rehearing [R. 393]. No ruling was ever secured from the Court of Appeals and no mention was made in the opinion of this vital question.)

At the close of the plaintiff's case, petitioners moved to dismiss for lack of jurisdiction because of failure to show an actual controversy (R. 34). This motion was denied by the District Court and a similar motion denied by the Court of Appeals (R. 361).

The insured Burgess met his death as a result of a wound from an old double-barrel shotgun which was dis-

charged while he was carrying it down the stairs at a rapid pace. There were no eyewitnesses to the discharge of the gun. The evidence was entirely circumstantial. (The evidence showed that the insured was acting strangely on the day of his death, and that he had been taking nembutal capsules to sleep; that this drug affected the mind severely. No witness expressed a formal opinion of sanity or insanity. Petitioners relied on the showing of irrational conduct and the fact that the burden of proof of sanity was upon the insurer to support a finding of insanity.)

The Court of Appeals held that the evidence showed, as a matter of law, that the insured committed suicide while sane and undertook to pass on all questions of fact and direct judgment contrary to and without the verdict of a jury. It found that the duty was upon the petitioners to offer a formal opinion of insanity. On motion for rehearing and motion to remand the petitioners offered to supply such an opinion on retrial and annexed an affidavit of a prominent expert that upon the uncontroverted facts he would render a formal opinion that the insured was insane at the time of and prior to his death (R. 378-383).

The principal opinion states that the defendants produced evidence on the issue of insanity "on the theory that the burden of producing evidence on that issue had shifted to them" (R. 350), and also states that "defendants, not relying on any presumption of accident arising from proof of death by violent and external means, attempted to prove by an expert how insured might have accidentally shot himself * * *."

On the question of the burden of the evidence the record shows that the petitioners herein at all times insisted that the burden of proo and burden of evidence with respect to sanity and suicide rested on the respondent insurer. Petitioners moved for a directed verdict on this

theory (R. 34-35). By proceeding to offer evidence after an adverse ruling by the Court, the petitioners waived nothing (Federal Rules of Civil Procedure 50). Petitioners also made a motion for a directed verdict at the close of all the evidence (R. 219). Both motions were made expressly upon the theory that the respondent insurer had failed to meet the burden of proof imposed upon it. At the request of the petitioners the Court instructed the jury that the burden of proof rested upon the respondent insurer (R. 224). In the briefs petitioners insisted and still insist that the burden of proof both in its primary and secondary sense rested upon the respondent insurer (R. 244). It is an inadvertent misstatement of fact to state that the petitioners tried this case upon the theory that the burden of proof in any sense was upon them.

On the question of reliance on the presumption of accident the record shows that the petitioners have at all times relied upon the presumption and inference of accident arising from proof of unexplained death by violent and external means without an eyewitness.

There is nothing in the record to justify the statement that petitioners did not rely on the usual presumption of accident, but the record shows reliance in the District Court and in the Circuit Court of Appeals on the presumption. *In the District Court:* Petitioners' motion for directed verdict at the close of respondent's evidence (R. 34-35); petitioners' motion for directed verdict at the close of all the evidence (R. 219); charge of Court on presumption given at request of petitioners (R. 224-225); exceptions to charge of Court by petitioners (R. 223); petitioners' request (R. 234-235); petitioners' exception (R. 299). *In the Circuit Court:* Petitioners' brief, Point IV, pp. 69-72, Point I (5), pp. 28-29; Motion for Rehearing (R. 396-399, 401, 410).

The principal opinion undertook to determine the ques-

tion of fact concerned by stating that the presence of blood in both barrels of the gun was uncontradicted proof of a physical fact wholly inconsistent with actual discharge of the gun (R. 353).

While petitioners do not consider such an isolated fact conclusive, they wish to point out that there was evidence both ways on this issue. Respondent's witness, the Coroner, could remember seeing blood in only one barrel (R. 42). The same is true of the respondent's witness, Patrolman Ridgeway (R. 207).

These erroneous statements in the opinion, as well as material facts favorable to petitioners omitted from the statement in the opinion, were called to the attention of the Court of Appeals by motion to modify (R. 385-390), which was denied (R. 422) without comment.

Review by this Court is sought under the provisions of Section 240 of the Judicial Code (43 Stat. 938).

QUESTIONS PRESENTED.

(1) Whether in directing the District Court to enter judgment for the respondent insurer without further submission of the issues to a jury the Circuit Court of Apepals usurped the functions of a jury and deprived the petitioners of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

(2) Whether the Circuit Court of Appeals ignored the applicable law of the State of Missouri that proof of an unexplained death by violent and external means without an eyewitness is sufficient proof to make a submissible case of death by accident.

(3) Whether the Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which

they did not bear at the close of the plaintiff's case in chief, simply by introducing evidence of the circumstances of the insured's death, after their motion for directed verdict had been overruled.

(4) Whether, under the Federal Declaratory Judgments Act, an insurer may file suit without first denying liability and without investigating the case to determine liability; that is to say, whether a justiciable controversy exists where an insurer, upon receipt of claim, files suit without denying liability to the beneficiaries and without investigating the merits of the claim.

(5) Whether the Circuit Court of Appeals erred in holding that the Federal Rules of Civil Procedure 50 (b) require direction of verdict by the appellate court, even in cases when is it shown that the deficiency in proof found will be supplied on a retrial.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

(1) The Circuit Court of Appeals erred in finding, as a matter of law, that the insured died as a result of suicide while insane. It thereby usurped functions of a jury and deprived petitioners of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

(2) The Circuit Court of Appeals ignored the applicable law of the State of Missouri that proof of an unexplained death by violent and external means without an eyewitness makes a submissible case of death by accident.

(3) The Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which they did not

bear at the close of the plaintiff's case in chief, simply by introducing evidence of the known circumstances of the insured's death after their motion for directed verdict had been overruled.

(4) The Circuit Court of Appeals erred in holding that an insurer may file suit under a declaratory judgments action without first denying liability to the insured and without investigating the case to determine liability; and in holding that an actual justiciable controversy exists where an insurer, upon receipt of claim, files suit without denying liability to the beneficiaries and without investigating the merits of the claim.

(5) The Circuit Court of Appeals erred in holding that the Federal Rules of Civil Procedure 50 (b) require direction of verdict by the appellate court, even in cases when it is shown that deficiency in proof found will be supplied on a retrial.

PRAYER FOR WRIT.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for review and determination, on a date certain to be therein designated, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 11,657, Reliance Life Insurance Company, a corporation, appellant, v. Mae B. Burgess, Coadministratrix, and Fred Fancher and Adrian J. Gum, Coadministrators of the Estate of T. A. Burgess, deceased, appellees," and that said judgment of said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and that the petitioners have such other and

further relief in the premises as to this Honorable Court seem meet and just.

MAE B. BURGESS, Co-Administratrix,
FRED FANCHER and ADRIAN J. GUM, Co-Administrators of the Estate of T. A. Burgess, Deceased,
Petitioners.

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
All of Columbia, Missouri,
Attorneys for Petitioners.